United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1977

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 74-1977

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S

SELENE WEISE

Plaintiff-Appellant

v.

SYRACUSE UNIVERSITY, et al.

Defendants-Appellees

On Appeal from the United States District Court for the Northern District of New York

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BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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STATUTES

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Brief for the United States Equal Employment Opportunity Commission As Amicus Curiae

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Statement of Interest

The United States Equal Employment Opportunity Commission (hereinafter "the EEOC or Commission") is charged with the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Supp. II, 1972). This case presents issues of importance to the administration and interpretation of Title VII, including the

question of whether the defendant's challenged conduct constitutes a continuing course of discriminatory conduct against plaintiff sufficient to render timely her charges to the Commission. Therefore, it is in the public interest that the Commission present its views to the Court.

Statement of the Case

This case is on appeal from an order of the United States District Court for the Northern District of New York granting a Motion to Dismiss the complaint brought by Selene Weise against her former employer, Syracuse University, alleging employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp II,1972) §2000e et seq. and of 42 U.S.C. §§1983 and 1985(3). The relevant facts may be summarized as follows:

Plaintiff, a female, applied for a faculty position with the Defendant University in 1969. She was denied the position and it was awarded instead to a male. In January 1970, she applied for, and was awarded a non-faculty position as a graduate teaching assistant which she filled from September 1970 until her position was terminated in June 1971.

In June 1970, plaintiff filed charges with the New York Division of Human Rights alleging that the 1969 denial of a

faculty position was the result of sex discrimination. She pursued her state remedies throughout 1971 and 1972, filing several additional charges with the state agency alleging acts of retaliation during the process. On May 8, 1972, while still pursuing her State remedies, plaintiff filed a charge with the EEOC. That charge alleged that the 1969 denial of a faculty appointment was discriminatory; that the University had continuously discriminated and was currently discriminating against women as a class in faculty appointments; that the decision to terminate her non-faculty appointment, made one week after the commencement of state agency hearings was retaliatory and resulted in depriving her of a similiar appointment for the academic year 1971-1972; and that, as a further act of retaliation, the University had revoked her medical parking permit which made her unable to continue attending the University.

After an absence from Syracuse during the 1971-1972 term, plaintiff returned in August 1972, and applied for a teaching position at the University, stating that she would accept any teaching position. In January 1973, plaintiff again applied for a position, again stipulating that she would accept any teaching position. In February 1973, she was informed that teaching assistantships would no longer be given to doctoral candidates such as plaintiffs. However, thereafter a male doctoral candidate had his teaching assistant-

ship renewed. (Complaint p. 14 ¶ 46).

On February 26, 1973, plaintiff filed an additional charge with the New York State agency, alleging that she had not been considered for a teaching assistantship in January and February 1973 because of her sex, and because she had previously filed complaints against the University. On June 25, 1973, she filed the identical charge with the EEOC, which consolidated the new charge with that she had previously filed. On June 28, 1973, the EEOC, at plaintiff's request, issued to her a notice of right to bring suit, and this action was commenced within 90 days thereafter.

Plaintiff brought this action as a class action under Title VII, 42 U.S.C. §1981 and 42 U.S.C. §1985(3). The University moved to dismiss the complaint on a variety of grounds and the court below granted the motion. The court held that plaintiff had no cause of action under either 42 U.S.C. §1981 or 42 U.S.C. §1985(3)since no state action was involved in the challenged conduct. In addition the Court may have held that plaintiff had no cause of action under §1985(3), since her allegations were insufficient to

allege a conspiracy.[1/]

With respect to plaintiff's Title VII claims, the court below held that the latest arguable act of discrimination against her ocurred in June 1971, the effective date of her termination from her position as a teaching assistant. The court reasoned that all further conduct by the University was in response to plaintiff's attempts to alter that decision and therefore could not constitute additional discrimination by the University. The court did not discuss plaintiff's applications for a position in August 1972, and January 1973. The court concluded that, because the last act of discrimination occured in 1971, prior to the amendments to Title VII, effective March 24, 1972, which for the first time made educational institutions subject to the requirements of the Title with respect to teaching personnel, the court did not have jurisdiction over that conduct under Title VII.

1/ Although the Memorandum-Decision and Order in this case does not specifically discuss the conspiracy allegation, it does incorporate by reference the reasoning in a similiar case, Mortenson v. Syracuse University, C.A. No. 73-CV-545, (N.D. N.Y., 1974) which held that virtually identical allegations to those made in this case did not sufficiently allege the existence of a conspiracy.

In addition, the court held that, since plaintiff had no viable claim of her own, she could not represent a class of females who might have such claims. The court may also have held that plaintiff could not represent a class including persons presently employed by the University because she was no longer employed there.[2/]

Plaintiff's complaint was dismissed in its entirety; this appeal followed.

2/ This was one of the holdings in the Mortenson case, incorporated by reference in this case. See fn. 1, supra.

ARGUMENT

I. PLAINTIFF HAS ALLEGED THAT THE DEFENDANT HAS CONTINUOUSLY DISCRIMINATED AGAINST HER BECAUSE OF HER SEX ON OCCASIONS WELL PAST THE EFFECTIVE DATE OF THE 1972 AMENDMENTS TO TITLE VII AND HAS FILED TIMELY CHARGES WITH THE EEOC CHALLENGING THAT CONDUCT.

The premise on which the district court's decision rests is that plaintiff has not alleged discriminatory conduct occurring after the effective date of the 1972 amendments to Title VII, March 24, 1972. That conclusion simply ignores the allegations of plaintiff's complaint.

Plaintiff has alleged that the University has continuously discriminated against her because of her sex on numerous occasions, the most recent of which occurred in January and February of 1973, when, she alleges, the University refused to consider her for any teaching position because of her sex, and because she had previously challenged the University's hiring practices as discriminatory. This Court has held that the refusal to consider a woman for a position becasue of her sex in itself constitutes a violation of Title VII. Gillin v. Federal Paper Board Co., 479 F.2d 97, (2nd Cir. 1973). Therefore plaintiff has clearly alleged discriminatory conduct by the University subsequent to the effective date of the 1972

amendments to Title VII. The district court's conclusion to the contrary is manifestly in error.

Plaintiff has alleged that the University has engaged in discriminatory conduct against her on a number of occasions—in 1969, 1970, 1972 and 1973. Each of these allegations charges a separate and distinct violation of Title VII, and there can be no question that she has a viable cause of action with respect to each such discriminatory incident occuring after the effective date of the 1972 amendments to the Title. See Marlowe v. General Motors Corp., 489 F.2d 1057 (6th Cir. 1973); Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972).

The district court seems to have felt that the University's post-1972 conduct towards plaintiff was merely a continuation or reaffirmation of its earlier, pre-1972 decisions with respect to her, and therefore did not constitute an independent violation of the Title. There is, however, no basis in the record to support such a conclusion. The University has not suggested that its pre-1972 decisions with respect to plaintiff served as the basis for disqualifying her from obtaining a position in 1972 or 1973. Furthermore, even if that were the case, if the University's post-1972 conduct reaffirmed prior discrimination,

the act of reaffirming the prior decision would itself constitute an independent violation of the Title. See Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971).

With respect to the January-February 1973 incident, there can be no question that plaintiff filed a timely charge with the EEOC. Her EEOC charge challenging the University's refusal to consider her for a position at that time was filed in June 1973, well within the 300 day charge-filing period provided in Section 706(e) of the Title, 42 U.S.C. §2000e-5(e). 3/

3/ The district court may have felt that plaintiff's June, 1973 charge, filed 3 days prior to her request for a suit letter, could not support this action because it had not been pending before the EEOC for 180 days, as is ordinarly required by Section 706(f)(1) of the Title, 42 U.S.C. §2000e-5(f)(1). See the district court's discussion of the second charge in Mortenson v. Syracuse University at pp. 7-8 of the Slip Opinion, fn. 1, supra. It is well established, however, that an individual need not comply with the procedural requirements of Title VII for each separate incident of discrimination in a continuous course of conduct which has previously been properly brought to the attention of the EEOC. Thus separate charges are not required to challenge subsequent acts of discrimination similar in nature and related to those previously alleged. See, e.g., Shannon v. Western Electric Co., 315 F.Supp. 1374 (W.D. Mo. 1969); Latino v. Rainbo Bakers Inc., 358 F.Supp. 870; 5 FEP Cases 917 (D.C. Col. 1973). Cf. Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973). Furthermore, even if plaintiff had brought this action prematurely, she could have cured that defect by requesting a suit letter after the 180 day period had expired. See Henderson v. Eastern Freightways, Inc., 460 F.2d 258 (4th Cir. 1972), cert. denied, 410 U.S. 912 (1973).

Furthermore, plaintiff's May 1972, charge to the EEOC was clearly sufficient to allow her to challenge the University's refusal to consider her for any teaching position subsequent to her application in August 1972. Her May 1972, charge alleged that the University had continuously discriminated against her for several years. Any investigation of that charge would inevitably have disclosed that the University had again refused to employ plaintiff for the academic year 1972-1973. Since this conduct would necessarily have been disclosed by an investigation of her May 1972, charge, there was no necessity for plaintiff to file an additional, superfluous charge challenging a renewal of the conduct previously brought to the EEOC's attention. See Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973).

Thus it is plain from the allegations of plaintiff's complaint that she has alleged violations of Title VII continuing past the effective date of the 1972 amendments to Title VII, and that she has filed timely charges with the EEOC concerning that conduct. The district court's decision to the contrary is clearly in error.

II. PLAINTIFF IS A PROPER RESPRESENTATIVE OF THE CLASS FOR WHICH SHE SEEKS RELIEF.

Plaintiff has alleged that she has been discriminated against because of her sex. Thus it is clear that she may seek relief for all others who have suffered from the same sex bias of the hands of the University. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir. 1973). The district court's suggestion that a former employee may not represent present employees is clearly contrary to the established law. See, e.g., Johnson v. Georgia Highway Express Co., supra; Tipler v. E.I. duPont de Nemours & Co., supra; Reed v. Arlington Hotel Corp., supra; Roberts v. Union Co., 487 F.2d 387, (6th Cir. 1973).

III. PLAINTIFF HAS PROPERLY ALLEGED A VIOLATION OF 42 U.S.C. §1985(3).

The district court held that plaintiff had not alleged a violation of 42 U.S. C. §1985(3) because the University's conduct did not involve state action. It is now well established, however, that Section 1985(3) proscribes purely private conspiracies. Griffin v. Breckenridge, 403 U.S. 88 (1971). Furthermore there is no question that the provision proscribes conspiracies to

deprive individuals of their federally quaranteed rights to employment opportunity free of invidious discrimination. Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971); Marlowe v. General Motor Corp., supra.

Nor is there any merit to the district court's suggestion that plaintiff has failed adequately to allege a conspiracy under Section 1985(3). The courts characterization of her allegations as "merely cite [ing] these individuals for failing to perceive and rectify her complaints.."(Mortenson v. Syracuse University, p.4 fn. 1 , supra) is inaccurate. Thus, for example, plaintiff alleges that defendants Reid and Irwin determined individually, and without a departmental policy decision, not to grant teaching assistantships to doctoral candidates, a policy which affected only plaintiff. (Complaint, Paragraphs 44-47). She further alleges that such action was "effected by the parties collectively and in concert to deprive the plaintiff of her statutory, civil, and constitutional rights, because she is a woman...." (Complaint, Paragraph 55). Thus she has **clearly** alleged specific conduct intended to deprive her of her federally guaranteed rights grounded in a class-based animus.

Griffin v. Breckinridge, supra, requires no more. See Azar v. Conley, 456 F.2d 1382, 1384-1386 (6th Cir. 1972). Compare Richardson v. Miller, supra, 446 F.2d at 1248, n.6.

CONCLUSION

For all the reasons given above, we respectfully submit that the decision of the district court be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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November 12, 1974

Certificate of Service

I hereby certify that copies of the foregoing Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae have been forwarded this day by pre-paid postage to the following counsel of record.

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